# Civil Liability: Section 1983 Update

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## Investigative Detention

**Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003)**

A sixty-two-year old African-American photographer for national magazines was pulled over by an officer at 12:30 a.m. The officer claimed he was weaving, but Bingham contended he was driving properly and that the officer pulled him over because of his race. Bingham's license had expired and there was a 22-year-old outstanding felony warrant for an Andre Bingham who resided at the same address with a close physical description. Bingham was taken to the police station where he was detained for several hours after which he was released without any criminal or motor vehicle charges being brought against him.

The court upheld the denial of summary judgment on the **STOP** based on disputed facts as to whether or not Bingham was driving properly or not. The court found a potential Fourth Amendment violation in that such a stop is not de minimus. (See contrary opinion Ford v. Wilson, 90 F.3d 245 (7th Cir. 1996).

The equal protection claim failed, as evidence that the plaintiff was black, the officer was white, that the officer was able to see plaintiff's race prior to the stop, that the City was predominantly white and that no traffic citation was issued, was insufficient proof of discriminatory intent or motive.

Although the arrest would have been unlawful, since the statutory code prohibits the arrest of someone for solely being an unlicensed driver, the court determined that a reasonable officer could have believed that the detention for verification of the warrant was lawful in light of clearly established law and the information possessed.

**Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002)**

Burchett observed unmarked vehicles pull into his brother's driveway, which adjoined his home. He claims individuals getting out of the vehicle were wearing black clothes with no identification and two had masks on. When one yelled at him to get on the ground, he turned and ran for his porch fearing for the safety of his baby. He was handcuffed and placed in the rear of a police cruiser for three hours with the windows up and the car off in 90-degree heat.

The court found that the **DETENTION** was lawful under Michigan v. Summers. The 6th Circuit has extended Summers detention of individuals who are nonresidents, as well as those who arrive at the scene. Although the plaintiff never arrived at the search premises, the court found that because he approached the property line, paused and fled when the officers instructed him to get down, that the officers acted reasonably in detaining him.

The court found that the officers **USE OF HANDCUFFS** was reasonable and that the officers should not be held liable for the **TOO TIGHT HANDCUFFING**, since immediately upon being informed that the handcuffs were too tight, they immediately removed the handcuffs on the condition that plaintiff behave. (It should be noted that the officers described Burchett as being "generally in a rage" and he allegedly spit at persons walking by the car prior to the windows being rolled up.)

The court did conclude that detaining the plaintiff for three hours in 90-degree heat with no ventilation in the police cruiser violated his Fourth Amendment rights against unreasonable seizures. They noted that claims of excessive force do not necessarily require allegations of assault, but can consist of the physical structure and conditions of the place of detention. The government's interest in effecting the seizure did not justify the imposition of extreme heat on the individual.

**Johnson v. Campbell, 332 F.3d 199 (3rd Cir. 2003)**

A motel clerk, who was a former police officer, reported that she felt nervous because she had previously been robbed and plaintiff who had been in the motel office drinking coffee and flipping through newspapers began to pace and rub his head and answered her polite questions curtly, which made her feel uncomfortable. The officer found Campbell sitting in a van with another individual on a cold December night in the motel parking lot. Plaintiff was a high school basketball coach who was registered with his players at the motel. He at first did not comply with the request that his window be rolled down and repeatedly refused to show his identification. During the encounter plaintiff muttered, "son of a bitch" which resulted in his arrest for disorderly conduct. A jury found the officer not liable and the appeal was based on a denial of the trial court to enter a judgment as a matter of law in plaintiff's favor or to grant a new trial.

The court found that the stop had occurred after the officer persisted in refusing to accept plaintiff's refusal to cooperate. The court noted that the Supreme Court has consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or a seizure.

The officer believed that his arrest under the State Code was lawful since it prohibited, "offensively course utterance, gesture or… abusive language to any person." The State Supreme Court, consistent with U.S. Supreme Court precedent has limited punishment only to speech, which consists of fighting words. "The First Amendment on the whole offers broad protection for speech, be it unpleasant, disputatious, or downright offensive." "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principles characteristics by which we distinguish a free nation from a police state." Citing, Texas v. Johnson and Holston v. Hill. Profane words unaccompanied by any evidence of violent arousal, are not fighting words, and therefore protected speech. Cohen v. California. The court went on to cite a couple of cases from the 8th Circuit in which a woman said, "I will have a nice day, asshole" and where obscene gestures plus the yelling of profanities in Spanish were determined not to be fighting words. The court granted judgment as a matter of law and remanded the case to the district court for a trial on damages.

**Cady v. Village of McCook, Et Al., 57 Fed.Appx. 261 (7th Cir. 2003)**

Officers were dispatched to a call that a bare-foot man, seemingly all wet and talking to himself, was jogging along a grassy area. Plaintiff, the jogger, claimed the officers violated his constitutional rights by stopping him for twenty minutes. He also claimed he stopped jogging, gained weight, lost self esteem and much of his social life and had a hard time finding work due to the incident. The court found that the stop was reasonable in that officers engage in permissible encounters that are not limited to situations involving possible criminal activity, but also situations in which persons may need help or are in danger of harming themselves or others. The twenty-minute encounter was reasonable in light of the fact that the plaintiff engaged the officers in a discussion about religion and his rights. They explained to him that he was not under arrest and was free to leave, and in fact, let him leave without identifying himself.

**Feathers v. Aey, 319 F.3d 843 (6th Cir. 2002)**

At 1:25 a.m. officers received an anonymous 911 report of a white male with a beard, no shirt, possibly intoxicated, who pointed something at the caller, so he possibly has a weapon. Officers saw plaintiff who matched the description on his porch and repeatedly told him to take his hands out of his pocket. He did but then put them back in and turned toward the door into his house and leaned inside to tell his father to get a video camera. The officers seized him from behind and while trying to pin him against the pillar, one of the officer's finger was bitten.

The Court found that because the caller was anonymous, the *Terry*-Stop violated plaintiff's fourth amendment rights under Florida v. J.L. Also, the information received by the dispatcher did not support a finding of reasonable suspicion. Since the officers did not know the information came from an anonymous source, and what was relayed to them, amounted to reasonable suspicion for a *Terry*-Stop, they were entitled to qualified immunity. The Court noted that there might be a legitimate question about whether the City should be held liable for a policy that does not inform dispatched officers of the reliability of their tip.

Finally, the Court found that the use of force was reasonable to affect the Terry stop and that the arrest was lawful because it was made based on the officer having his finger bitten.

**Marshall v. Columbia Lea Regional Hospital, 345 F.3d 1157 (10th Cir. 2003)**

Profiling claims may be substantiated by evidence of (1) an overtly discriminatory policy or (2) statistical comparisons between the alleged violated group stops or arrests and the relevant population or (3) direct evidence of police motivation. In this case, Marshall attempted to prove discriminatory motivation by direct evidence of the officer's pattern of traffic stops and arrests, his questions and statements and other relevant circumstances.

Marshall first claimed that he did not violate any traffic violation, and therefore, the stop was pretextual. Second, because the officer made eye contact with him prior to activating his emergency lights he found that the officer was ascertaining his race. Third, the first words out of the officer's mouth were "is a few rocks worth all that?" in an accusatory tone, inferring the officer was acting on the basis of stereotype or prejudice, rather than evidence. Fourth, on the citation form designating gender, the officer wrote "B-M" making a racial designation where none was called for. Fifth, the officer wrote on the original criminal complaint that Marshall accelerated to 100 mph, drove through a four way stop and weaved from lane to lane but failed to mention these facts in a sworn affidavit. This change of story tends to show pretext.

The above facts created a sufficient basis to allow this case to go to trial as the court compared it to Johnson v. Crooks, 326 F.3d 995 (8th Cir. 2003) where a police officer observed a motorist's race, followed her closely for eleven miles, stopped her for a traffic violation she denied, and later contacted her apparent employer…"

In addition to the above acts was evidence of prior misconduct. Slightly more than a year before this incident, the officer was forced to resign from the Midland Texas Police Force, which found an extensive pattern of misconduct in violation of citizen's constitutional rights including evidence in more than thirty cases in which the officer falsely charged arrestees with possession of narcotics, mishandled narcotics evidence, planted evidence and used evidence to barter for sexual favors. In a termination memo the chief stated that the officer had "failed to treat people fairly and equally under the law."

***Warrantless Blood Tests:***

The plaintiff also claimed that the warrantless blood test violated his Fourth Amendment Rights. At the hospital plaintiff told the nurse that he did not consent to the blood test, but would not resist attempts to take his blood. Schmerber v. California, stands for the principle that warrantless blood tests performed without consent are presumptively unreasonable unless the state actors involved have probable cause and exigent circumstances. Schmerber involved a case in which there was a serious accident with a potential of a felony prosecution, therefore authorizing a potential warrant for a blood test. In this case, the State allowed for warrants where a DUI led to death or great bodily injury or would produce material evidence in a felony prosecution. Since no warrant could be obtained in this case, a blood taking based on exigent circumstances without a warrant could not be possible. The court did find that the medical personnel would be entitled to qualified immunity based on their reliance on the police officer's

request to take the blood. The case was remanded for determination of sufficient evidence for an equal protection claim and whether Marshall consented to the blood test.

## False Arrest/Malicious Prosecution

**Thompson v. Wagner, 319 F.3d 931 (7th Cir. 2003)**

Five months after Berry had knowingly purchased two diamond rings with a bad check, he told officers that he gave the ring to his girlfriend who took a diamond out, put it in her own ring, gave it to her brother, who in turn gave it to his wife, the plaintiff. The two deputies went to the store where the plaintiff, a 50-year-old woman, had worked for 20 years. They told her that they believed that the diamond that she was wearing was stolen, but that she would not be arrested if she admitted her guilt. The officers asked to take the ring, which led to her asking to call her husband. When she got up from the chair and began to walk away, officers handcuffed her and then placed her in a police cruiser. She remained cuffed for 5-10 minutes and waited in the car for about 10 minutes before her husband arrived and turned over the rings, which proved not to be the stolen diamonds. The court found that the officers did not have probable cause to arrest her for possession of stolen goods as they were acting on a statement five months after the crime, given by a convicted felon who had previously lied to him. In addition, the officers had no knowledge about diamonds.

The court also found that their theory of obstruction failed as when she wanted to get up and call her husband, she had every right to do so.

Finally, the handcuffing and detention could not be justified under Terry v. Ohio, as the officers made no attempt to say their actions were necessary for their own protection.

**Franklin v. Fox, 312 F3d 423 (9th Cir. 2002)**

Twenty years after the sexual molestation and murder of her eight-year-old best friend, Franklin-Lipsker informed the police that she had witnessed the crime and that her father had molested both her and her sister. After Franklin was convicted and sentenced to life in prison, a federal habeas court found that his constitutional rights had been violated and ordered that his conviction be vacated and that he be granted a writ of habeas corpus. He then sued his daughter and the investigating officers claiming they conspired to arrest him without probable cause based on the following allegations.

**A. The officer relied on a witness who had undergone hypnotherapy to restore their memory thus being inadmissible.**

This claim failed as Franklin could not produce evidence that the officers knew that Franklin-Lipsker's recovered memories of the murder were a result of hypnosis and probable cause determinations may rely on evidence that would not be admissible at trial.

**B. Details of the crime were available in media accounts available to Franklin-Lipsker.**

This claim failed as Franklin could produce no evidence that the officers actually read the articles prior to his arrest and there was independent evidence provided by the daughter that was not in the media account.

**C. The officers and daughter conspired to suppress her criminal record including arrests for prostitution and possession of cocaine.**

The court found that although suppression of such information might have affected Franklin's ability to impeach his daughter at trial, it was not relevant to probable cause and qualified immunity determinations.

When first confronted by the police, Franklin asked them whether they had spoken with his daughter or daughters. Franklin claimed that officers should not have relied on this statement in making the arrest. Assuming this to be true, in taking this statement out, the court found the officers still had sufficient basis to substantiate probable cause for arrest. It was reasonable for them to believe that Franklin-Lipsker was a credible witness. They checked her statement against information in the Sheriff and Coroner files and found they possessed information they believed was not known to the public. Although there were some discrepancies, the court asked only whether the officers reasonably could have believed that such discrepancies could be expected of an eyewitness account twenty years after the event.

Finally, they had verified certain information with the sister who shared her own suspicions of her father's guilt. The court concluded that Franklin failed to demonstrate any issue of material disputed fact regarding the reasonableness of the investigators belief in their probable cause. The court also found that Franklin-Lipsker had not conspired with the officers. The State's Attorney and prison official who arranged for the daughter to meet with her father in prison, in violation of the sixth amendment rights were protected by qualified immunity.

**Crockett v. Cumberland College, 316 F.3d 571 (6th Cir. 2003)**

Two male and two female students were in a college dormitory room dancing, tickling, and slap boxing. After a third male entered the room, one of the girls was held down and raped during which a couple of other male students entered the room. Two of the male students were arrested for complicity in first-degree rape. The investigator and county attorney interviewed the females, and reviewed reports from Cumberland officials prior to submitting an arrest warrant application. The boys were not indicted and brought suit, claiming lack of probable cause.

The court found that there was sufficient probable cause to make the arrest and that once probable cause is established an officer is under no obligation to continue an investigation or look for additional evidence, which may exculpate the accused. Officers are also under no obligation to give any credence to a suspect's story nor should a plausible explanation require them to forego an arrest pending further investigation. Reliance on the statements of the victim and an eyewitness may alone be sufficient to establish probable cause. Absent evidence that the officers knowingly or in reckless disregard for the truth, made material misstatements, officers would be entitled to qualified immunity.

**Coonts v. Potts, 316 F.3d 745 (8th Cir. 2003)**

Plaintiff interfered with officers' execution of a facially valid writ of execution on her property. She was arrested after refusing entry, assaulting the officers and destroying some of the property to be levied.

The district court found that the officers had probable cause, but they charged her with the wrong crime. The appellate court noted that there is a difference between unlawful arrest and charges named in error. A valid arrest does not turn on the suitability of the stated grounds for arrest but, instead, on whether the officers have probable cause to believe that an offense has been or is being committed.

The court affirmed the summary judgment on behalf of the officers then sanctions imposed against counsel for failure to conduct a reasonable inquiry of the factual and legal basis for a claim before filing it.

**Valente v. Wallace, 332 F.3d 30 (1st Cir. 2003)**

Plaintiff was arrested for writing bomb threat notes at her place of employment. She was never prosecuted because the prosecutor failed to meet the discovery deadline. She claimed officers did not have sufficient probable cause based on a handwriting analysis and that a psychological profile commissioned by the company suggested a culprit with traits different from hers. The court noted that although the handwriting expert can do little more than say that it was "more likely than not" and that handwriting is an inexact science, psychological profiling seems to be even more inexact. In addition, the notes began not long after she joined the company and were found in the building in which she worked. Also, of some limited significance was the fact that the detective said she appeared to be nervous and usually innocent persons protest much more strongly when wrongly accused, justifying sufficient probable cause.

**Kukla v. Hulm, 310 F.3d 1046 (8th Cir. 2002)**

Plaintiff, a truck driver, refused to turn over his logbooks to an un-uniformed inspector who refused to identify himself. A few seconds later, a uniformed enforcement officer, driving a marked vehicle approached and Kukla provided this officer with all of the appropriate paperwork, which was in order.

The un-uniformed inspector issued Kukla a ticket for failing to produce his logbook and when Kukla refused to sign, a state trooper arrived and physically handcuffed him.

There was no federal or state regulation creating an offense for failing to produce a logbook, however, when requested to do so by a uniformed inspector, truckers may be arrested. Because there is no offense for refusing to turn records over to a person who is not identifiable as an authorized officer or inspector, Kukla had a viable false arrest claim.

Kukla also claimed that the handcuffs were placed on too tightly and not loosened for 15 minutes despite his repeated complaints. Given the circumstances, including the minor offense,

the lack of immediate safety threat and lack of resistance, the court found that there was a genuine issue of whether the force used was excessive.

**Abrams v. Walker, 307 F.3d 650 (7th Cir. 2002)**

Plaintiff, an attorney, followed his client from court onto a highway. When Abrams' client was stopped by a trooper, he backed up on the highway and approached the officer conducting the stop. Upon questioning the officer about the stop, the officer informed him to return to his car but he refused and was told that he was going to be issued tickets. Plaintiff then turned to return to his car and said he was going to leave. The officer, while stopping plaintiff, found a knife in his car and placed it on top of the roof. When the officer returned to his cruiser to call for backup, plaintiff retrieved the knife and put it back in his car. He was then taken into custody and charged with obstructing a police officer and resisting arrest in addition to improper parking and improper backing.

After being found not guilty of the charges, plaintiff sued for malicious prosecution and retaliation against him for exercising his first amendment rights.

To establish a prima facie case for First Amendment retaliation, the plaintiff must demonstrate that his conduct was constitutionally protected and was a substantial factor or motivating factor in defendant's challenged actions. If the plaintiff proves that the challenged action would not have occurred but for the constitutionally protected conduct, the burden shifts to the defendant who must show by a preponderance of the evidence that he would have taken the same actions, even in the absence of the protected conduct.

The court cited cases stating that the Constitution permits citizens to criticize police officers both verbally and non-verbally, such as, making an obscene hand gesture and yelling expletives and shouting at police, however, not all conduct is protected, such as, refusing to remove a mask, interfering with an arrest, or refusing to clear an area.

The court concluded that the plaintiff failed to demonstrate his conduct was constitutionally protected as he admitted that he was disobedient and dilatory, attempted to flee the scene once informed he would be ticketed, and retrieved the weapon, all resulting in the effect of interrupting and delaying the officer's traffic stop. The court declined to rule in accordance with the 2nd and 11th Circuit, that the existence of probable cause is a complete defense to a First Amendment retaliation claim in the context of an arrest.

**Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003)**

Fifteen years after his conviction, the plaintiff was pardoned on the grounds of innocence after fingerprints and other information implicated another individual. A jury found officers liable for concealing evidence favorable to the defense and awarded Newsome $15,000,000.00 in damages followed by a court award of $850,000.00 in attorney's fees and costs. At the initial trial, three individuals positively identified Newsome as the killer. Twenty years later, at the civil trial, one of the witnesses was dead, one could not be found, leaving Rounds, who denounced his earlier testimony, insisting that the two detectives insisted that he select number 3

in a line up. The officers admitted that one of the other witnesses had improperly been shown photos before the line up to improve the chance that the witness would pick out Newsome.

Rounds testified that the officers threatened him with imprisonment if he told the prosecutors what actually happened at the line up. The City's interpretation of this was that the officers told Rounds that he faced criminal investigation unless he told the whole truth.

Liability was premised under the due process clause based on the concealing of exculpatory evidence, namely details of how witnesses were induced to finger Newsome. The court discussed the difficulty in cases relying on eyewitness identification, concluding, "this is why it is vital that evidence about how photo spreads, show ups, and lineups are conducted be provided to defense counsel and the court."

**Dahl v. Holley, 312 F.3d 1228 (11th Cir. 2002)**

Dahl founded a citizens group to provide information and encourage reform of the legal system. Her son was arrested for possession of narcotics based on information provided by a confidential informant named McCardle. She alleged that both her son and McCardle were being pressured to be informants for the police and that McCardle expressed concern that he could not "get out". Dahl encouraged McCardle to attend the meeting with the Mayor to discuss police department corruption. When he expressed concern that police would resurrect old drug charges and he wouldn't be able to afford an attorney, Dahl through the organization, offered to pay up to $10,000 in attorney's fees on his behalf. McCardle then went to the police and told them that Dahl had offered $10,000 to him to lie about her son's arrest. During the investigation, taped conversations revealed nothing related to this, but spoke of the meeting with the Mayor during which Dahl specifically told McCardle to tell the Mayor the truth. Dahl was arrested and charged with bribing a witness and a search warrant was issued for her home and business, based on an affidavit that did not include the exculpatory statement that McCardle should not lie. At trial, the court granted a judgment of acquittal because the state failed to prove McCardle's statement would be used in an official proceeding. Dahl then sued for false arrest and illegal search as well as First Amendment retaliation.

Based on the record that officers had evidence which would lead them to reasonably believe that Dahl had offered something of value for McCardle to misrepresent circumstances surrounding her son's stop and search (even though the tapes only mention the meeting with the Mayor) it was not an illogical conclusion to believe that McCardle would also give testimony in the proceeding against her son. The court concluded that the officers had arguable probable cause for the arrest and that they did not omit material facts which would have negated a finding of probable cause with regard to the search.

With regard to the retaliatory claim, they found that the existence of probable cause to arrest Dahl defeated her First Amendment claim.

**Hinchman v. Moore, 312 F.3d 198 (6th Cir. 2002)**

Plaintiff's best friend stayed with her throughout an investigation of the murder of the best friend's husband. After the friend admitted to killing her husband, police went to plaintiff's home to speak to her. After she refused, the officers were advised by a detective that there was an investigative subpoena on the way and they should return to plaintiff's apartment. Upon observing plaintiff leaving her apartment and getting in her car, they asked her to wait for the investigative subpoena. She refused and in backing up, one of the officers claimed he was struck by the vehicle. Plaintiff was charged with felonious assault. She claimed that she never struck the officer and was acquitted by a jury.

In the false arrest action, the District Judge granted defendant's motion for summary judgment because a State Judge at a preliminary hearing had determined probable cause and the record indicates that probable cause existed.

Collateral estoppel applies when there is: (1) an identity of parties; (2) a valid final judgment; (3) the same issues were actually litigated and necessarily determined in the first proceeding, and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue.

The Appellate Court found that a finding of probable cause in a prior criminal proceeding did not bar the plaintiff's subsequent civil action for malicious prosecution where the claim was based on the officers supplying false information to establish probable cause. The key factor is that the claim here is more accurately characterized as a challenge to the integrity of the evidence than to its sufficiency. Therefore, the identity of the issues is lacking.

The court concluded that at the summary judgment stage, they were required to accept plaintiff's factual assertions and falsifying facts to establish probable cause is patently unconstitutional.

**Napier v. Preslicka, 314 F.3d 528 (11th Cir. 2002); 331 F.3d 1189 (11th Cir. 2003)**

The court ruled that a prisoner could not bring a claim against officers for false arrest in an unrelated misidentification case while plaintiff was serving time in prison. 42 U.S.C. §1997e states that "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injuries suffered while in custody without a prior showing of physical injury."

Plaintiff claimed that the false arrest caused him embarrassment and mental anguish from the deprivation of his Fourth Amendment rights. Since the emotional distress resulted while the plaintiff was in custody, PLRA applies to prisoner lawsuits that claim injuries suffered during custodial episodes, even if such custody occurred outside the prison walls.

**Giannullo v. City of New York, 322 F.3d 139 (2nd Cir. 2003)**

Question of arguable probable cause precluded summary judgment on behalf of officers. Undercover officers conducting surveillance in a high crime area near methadone clinic saw Giannullo exit the clinic, speak to Oliver, return to the clinic, and five minutes later return with a

brown bag which he handed to Oliver. Separate officers stopped Oliver and Giannullo. The officers stopping Oliver found illicit methadone and heroin. If the officers stopping Oliver and finding the contraband occurred prior to Giannullo's arrest, the collective knowledge doctrine would have provided sufficient probable cause.

**Anderson v. Larson, 327 F.3d 762 (8th Cir. 2003)**

A state narcotic officer working undercover was befriended by a drug suspect who told him his attorney, plaintiff, took drugs in exchange for legal services. The officer met Anderson on the pretext of discussing a fake charge against him and Anderson willingly took one half ounce of cocaine as partial payment. They then discussed future delivery of drugs to settle the rest of the bill. Anderson's conviction was overturned by the State Supreme Court, which found that there was insufficient evidence of solicitation.

With regard to the prosecutor's claim of absolute immunity, the court held that giving legal advice to police during an investigation strips a prosecutor of absolute immunity because it is not a normal part of prosecutions. The court found no liability for the use of the attorney's client in the investigation as the attorney/client relationship is not intended to protect an attorney from committing crimes.

The court also found that from the officer's perspective, when Anderson accepted drugs without protest in apparent exchange for legal services, there was ample probable cause for arrest.

**Shepard v. Ripperger, 57 Fed.Appx. 270 (8th Cir. 2003)**

Shepard was helping his friend move some furniture when police called his friend over to a squad car explaining they were investigating the theft of furnishings from the residence. When Shepard approached, he was told that the police needed his name, to which he responded, "I don't think so." Officers then stepped out of the police car and had Shepard put his hands on the hood. He moved his hands saying the hood is hot and was arrested for interfering with an officer. The court found that the officers were entitled to qualified immunity because the law is clearly established about whether refusing to identify oneself provides probable cause for arrest. The court noted that the Supreme Court has declined to decide whether a person may be punished for refusing to identify himself in the context of a lawful investigative stop.

**Kent v. Katz, 312 F.3d 568 (2d Cir. 2002)**

Katz responded to a fire complaint finding two employees of the plaintiff who had been burning brush on his property for 18 days. When Kent drove up, the officer noticed that his eyes were red and asked him if he had been drinking to which he responded sarcastically, "not very much". The officer stated that he was walking unsteadily, swayed as he stood and his speech was slurred and had a strong odor of intoxicants. Kent denied these allegations and provided affidavits from his employees that he had not been drinking. During the arrest for driving under the influence, the plaintiff's wrist was broken. The State reduced the charges to careless and negligent operation of a motor vehicle and accepted plaintiff's nolo contendere plea. The only

issue on appeal is whether the officer was entitled qualified immunity on the false arrest claims based on a finding of probable cause. The court first determined that the plea on the lesser offense did not constitute collateral estoppel as the issue of probable cause was never litigated. Also, the undisputed facts that his eyes were red and that he made the statement "not very much" when asked if he was drinking, did not establish probable cause given the context.

The most interesting part of this case was the dicta in the concurring opinion "what this case illustrates is that prosecutors consenting to reduce criminal charges in exchange for a defendant's plea should consider including in their agreements at least a settlement, and sometimes a complete release, of related civil liability claims against law enforcement officers." Newton v. Rumery, 480 U.S. 386 (1987).

## Search & Seizure

**Loria v. Gorman, 306 F.3d 1271 (2nd Cir. 2002)**

Police received two noise complaints within one hour. Loria was hosting a party for 70 to 80 people, predominately indoors, but included some guests on the driveway. Two officers arrived at approximately 1:30 a.m. followed by a separate group of officers approximately 45 minutes later. When a friend opened the door, officers asked the owner to come outside. Loria responded that he had nothing to say to the officers and told his friend to close the door. When the friend refused, Loria approached the door and attempted to close it. The officer stuck out his arm and leaned into the door, pushing the door back, hitting Loria in the face and knocking him backwards. At that point, the officer took a couple of steps into the foyer grabbed Loria and pulled him outside placing him under arrest.

Plaintiff claimed that when the officers arrived the music was off, however, if policemen receive a complaint from private citizens, that if true would justify an arrest, and they reasonably believe it is true, they cannot be held liable merely because it later turns out that the complaint was unfounded. Therefore, the alleged factual dispute as to whether or not the music was off would not be material and the officers were found to be engaged in an authorized official function when arriving at plaintiff's address.

The court found the officer's entry into Loria's home to make the arrest was unlawful, as exigent circumstances did not exist justifying the entry. The court suggested the following factors as guides to determine exigent circumstances justifying a warrantless entry: (1) The gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause… to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended, and (6) the peaceful circumstances of the entry.

**Tower v. Leslie-Brown, 326 F.3d 290 (1st Cir. 2003)**

Officers entered the Tower residence to arrest Mr. Tower and to remove the children on a child abuse case. At the time of the entry, the officers did not have the arrest warrant, but were

relying on the representation of a court official that a warrant had been issued. The court found that although an entry into a home to make a warrantless arrest would be a violation of clearly established law, the officers were entitled to qualified immunity based on their reliance of representations by a court official.

The plaintiffs further claimed that the officers seized their residence by staying behind after Tower's removal. In such a claim the court balances the privacy related and law enforcement related concerns to determine whether the intrusion was reasonable. In this case, the officers remained to preserve the safety of the remaining occupants, the Towers and the children, and therefore their actions were reasonable. The Towers claim that the officers acted unreasonably in searching their residence. After Towers was removed the officers conducted a protective sweep to ensure that no other persons were in the residence. The court also found this to be reasonable. Finally, the Towers claimed that the officers violated their Fifth Amendment rights under the taking clause by making long distance phone calls without authorization. The court noted that although the Fifth Amendment proscribes taking without just compensation because there was an available state remedy this claim failed.

**Brocuglio v. Proulx, 2003 WL 21369258 (2nd Cir. 2003)**

Officers were sent to place tickets on abandoned cars located on the plaintiff's property pursuant to a town ordinance. Defendants ticketed several vehicles in the front portion of the yard and then noticing others in the back, proceeded through a fence into plaintiff's yard where they ticketed more vehicles. The district court granted a partial summary judgment in favor of the plaintiff with regard to entering his property and ticketing vehicles in the backyard without a warrant. The Appellate Court denied defendants' claim that they were entitled to have the issue of qualified immunity preserved for trial based on disputed issues of fact. At the time of the events giving rise to the action, it was clearly established that the Fourth Amendment warrant requirement applied to administrative searches and that a fenced in backyard is curtilage, entitled to Fourth Amendment protection.

**Lori Graves v. City of Coeur D'Alene, 339 F.3d 828 (9th Cir. 2003)**

Aryan Nations planned a parade through the downtown streets of Coeur D'Alene. The Jewish Defense League said they would protest and warned that the streets would "run red with blood". Several hundred people gathered to protest and tensions were high. Intelligence was received that explosives had been stolen from a construction site approximately 300 miles away. One of the plaintiffs, Crowell, was wearing a heavy backpack with two cylindrical objects at the bottom. He repeatedly refused the defendant officer's requests to consent to a search of the backpack and refused to give the officer his name becoming louder during the defiant confrontation. The officer had knowledge of the Olympic backpack bombing. He radioed his Lieutenant who told him to "deal with it". A few seconds later, another supervisor said, "we need to look at that pack and if you won't let us look in the pack, arrest him". The officer did just that, was sued and the jury found for him as well as other defendants.

The Appellate Court found insufficient basis to justify the search of the backpack, however, found that the officer was entitled to qualified immunity. "Police officers rarely, if

ever, can objectively remove themselves from the immediate threats that they face, and yet they may have the obligation to risk their own lives to protect the public, while at the same time traversing difficult contours of constitutional law. The Supreme Court has 'frequently observed…the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment.'". For this reason, "law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable and should no more be held personally liable in damages than should officials making analogous determinations in other areas of law."

Neither supervisor could be held liable due to the jury's verdict in favor of the officer. In addition, neither supervisor knew the specific facts confronting the officer and therefore did not know that the arrest or search would be unlawful.

**King v. Fletcher, 319 F.3d 345 (5th Cir. 2003)**

An investigation into chop shops led to an inspection of vehicle identification numbers and subsequent seizure of the vehicles. The court found disputed issues of fact with regard to the consent to check the VIN numbers as well as whether the officers had probable cause based on knowledge that vehicles with rebuilt salvaged replacement parts, may lack VIN numbers or may not match VIN numbers on other parts of the vehicle. Finally, the claim that there were adequate post deprivation remedies failed because the remedy may not be adequate if plaintiff's have to go to unreasonable lengths to recover their property.

**David W. Lanier v. Ed Bryant, et al., 332 F.3d 999 (6th Cir. 2003)**

Plaintiff, Judge Lanier, was convicted of sexually assaulting women in his chambers in 1992. He brought a complaint claiming the defendants violated the Federal Wiretap Act by illegally intercepting telephone conversations between himself and other individuals, and then using these recordings to prosecute him. He claimed that the City had a policy and custom of instructing its police officers to follow FBI orders regardless of whether the FBI ordered the police officers to violate established law. The court found that these conclusory, unsupported allegations were insufficient to state a claim. They also found that Lanier failed to bring his claim within the two year statute of limitations under 18 U.S.C. Section 25-20(a) which provides that a civil action may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

**Caldarola v. The County o Westchester, 343 F.3d 570 (2nd Cir. 2003)**

The Department of Public Safety videotaped corrections officers who had been arrested for fraudulent job injury claims in the Department of Corrections parking lot as they were escorted from the DOC building. Copies of the videotape were distributed to the media. The court found that such filming of a "perp walk" does not constitute an invasion of privacy that is protected under the Fourth Amendment. In Lauro v. Charles, 219 F.3d 202 (2nd Cir. 2000) the court found that a staged perp walk in response to media interest violated the plaintiff's Fourth Amendment rights. In this case, the perp walk was not staged, but was part of the actual arrest process. In evaluating the privacy interests versus the government interest, the court found that

there were no constitutional violations. The interest delineated included informing the public about the government's efforts to stop abuse of disability benefits by its employees, deterring others from attempting similar crimes and informing and enabling members of the public to come forward with additional information relevant to the law enforcement investigation.

**Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003)**

Based on an allegation that $26.00 disappeared from a teacher's desk, an officer took thirteen fifth grade male students into the boys' room, ordered them to drop their pants, and inspected their underwear to ensure that the money was not inside. The appellate court held that this mass search, without individualized suspicion, was unreasonable and thus a violation of the Fourth Amendment. 261 F.3d 1160 (11th Cir. 2001). The Supreme Court vacated that judgment in light of Hope v. Pelzar. Plaintiff claimed on remand that case law provided "fair and clear" warning to the officer that his conduct was unconstitutional. They cited Vernonia Sch. Dist., 47J v. Acton, 515 U.S. 646 (1995) for the proposition that suspicionless searches were allowed only in limited context as the Supreme Court ruled that drug testing of high school students without suspicion was unconstitutional. They also cited three Eleventh Circuit cases; one decided a year after the incident in question, and the other two, which were factually distinguishable. Finally, they cited six opinions from other circuits. The court held that only Supreme Court cases, Eleventh Circuit case law, and Georgia Supreme Court case law created clearly established law in the Eleventh Circuit. Therefore, federal case law at the time did not provide school defendants and police with "fair warning" that a strip search of an elementary school class for missing money would be unconstitutional." (Note: The Eleventh Circuit's case law would now indicate that it is unconstitutional and at least six other circuits have also found such actions to be unlawful.)

## Excessive Force

**Jones v. Keller, 325 F.3d 520 (4th Cir. 2003)**

After drinking all day, Jones remembered he had to go to court the next day and called 911 so the police would pick him up and take him to jail so he could sleep it off. In booking, he asked an officer to un-handcuff him because he was smothering. Deputy Keller told him to quiet down, which led to an exchange during which Jones admits to using pretty foul language. When he stood up enough to alleviate his breathing difficulties, he alleged the officer knocked him to the floor and jumped on him, breaking his nose. Deputy Keller claimed that Jones was not handcuffed and took a swing at him, after which Keller accidentally hit Jones' nose while attempting to put him in a chin lock. However, Sheriff Buchanan testified that Keller made it clear that he hit Mr. Jones in the nose with his fist, and he also bragged about the incident to the Sheriff's son. Officer Hughes testified that Keller commented that his knee accidentally hit Jones' nose. The court found that Keller had used excessive force under a Graham v. Connor analysis. First, there was no crime at issue since Jones voluntarily went to the station. There was no immediate threat to the safety of the officers, as Jones was not armed, he was alone in a booking room with the deputy and according to his testimony, was handcuffed. Finally, he was not resisting arrest at the time Keller initiated the force against him. Jones concedes that he was drunk, angry and using foul language, however, the mere use of foul language does not justify an

objectively reasonable police officer knocking down the drunk and jumping on him and breaking his nose.

**Lumley v. City of Dade City, Florida, 327 F.3d 1186 (11th Cir. 2003)**

Lumley shot a Wells Fargo guard, seized a bag of money, and engaged in gunfire with that guard and another prior to carjacking a vehicle and escaping. Seven days later, an informant's tip led to his apprehension in Georgia. Because he had a bullet in his jaw, officers took him to a local hospital, where the doctor said he was not competent to remove the bullet. He was taken to jail, and waived extradition to Florida. Knowing that he could not be accepted at the detention facility with a gunshot wound, the deputies brought him to a medical center where they had him strapped to a hospital bed, guarded around the clock and prohibited all visitors including his family members and lawyers. Lumley consented to the surgery and when the bullet was removed, it was immediately handed over to Sergeant Register. Lumley's first claim was that he was denied his Sixth Amendment right to counsel. The court ruled that since Lumley was not interrogated and the formal criminal proceedings had not been initiated, his Sixth Amendment right to counsel had not been triggered.

He next contended that excessive force was used in strapping him to a hospital bed. The test applied to pretrial detainees in the 11th Circuit is the Fourteenth Amendment's due process clause requiring plaintiff to show that the defendant's conduct "shocks the conscience." The court found that the use of force in question on a dangerous criminal with a violent record who poses a significant risk of flight having escaped from prison on two separate occasions could hardly be said to shock to the conscience. The plaintiff's privacy claims under the Fourteenth Amendment also failed because Dr. Sack acted alone as opposed to Lumley's contention that he acted in conspiracy with the officers to remove the bullet from his face.

**McCormick v. City of Fort Lauderdale, 333 F.3d 1234 (11th Cir. 2003)**

McCormick, always carried an ornate wooden walking stick, approached a white female in a laundry mat and began harassing her by saying, " bye, bye white race, putting pieces of banana peel into her soap dispenser, telling her all white people should go back west and using other racial insults, resulting in the laundry owners calling the police. Before their arrival, McCormick claims the white woman came at him and he pushed her causing her to fall backwards, striking her head on the pavement. Upon arrival, Officer Walker saw the female in the chair bleeding profusely from the head, suggesting she had been subjected to an aggravated battery. McCormick claimed that he did not hear the officer say he was under arrest as he was speaking to another individual, and when he turned, a mist of liquid hit his face (pepper spray). McCormick then came at the officer, refused to obey the officer's order to stop and drop the stick as the officer backed out of the laundry. As McCormick advanced with the stick above his head the officer retreated, falling over a parking stone. As McCormick continued to charge, the officer fired a shot, saw blood, but McCormick still was continuing forward with the stick. Another officer again sprayed McCormick to no avail, and then the two officers took McCormick to the ground, but unable to restrain him, he rose again before again being brought to the ground. When other officers arrived, they used a stun gun and then were able to place handcuffs on McCormick.

McCormick's first argues that Officer Welker had no reason to arrest him since he had not interviewed any witnesses. The court found that he had sufficient trustworthy information to make an arrest for a violent felony upon seeing the bleeding woman and being told who caused her injury. McCormick claimed that the use of pepper spray without warning was unconstitutional. The court found that the use of the non-lethal weapon that would impose no lasting injury was proportional to the threat posed by McCormick and that the Constitution does not require advanced warning to a violent felon where the use of pepper spray is forthcoming. "Shock and surprise may be proper and useful tools in avoiding unnecessary injury to everyone involved when dealing with potentially violent suspects."

McCormick claimed that he had the stick over his head in submission. The court found that an objectively reasonable officer would have perceived McCormick as a threat, advancing toward him pumping and swinging a stick and ignoring repeated orders to drop the stick. When the officer tripped, he became quite vulnerable to attack and could reasonably perceive that McCormick posed an imminent threat of violence to him and others.

**D'Agastino v. City of Warren, 2003 WL 2220530 (6th Cir. 2003)**

Plaintiff who was intoxicated and threatening suicide ran from the hospital emergency room in his underwear. Officers were dispatched and advised that a white male in his fifties wearing only green underwear had escaped from the hospital and was HIV positive. The first officer to arrive claimed the plaintiff began running towards him yelling he wanted to die. The officer struck him once in the leg with his baton and a second time in the shoulder causing him to fall face first onto the pavement, where he was handcuffed. The plaintiff claims that he broke his fall with his arm, and once on the ground and handcuffed, the officer repeatedly slammed his face into the pavement. He suffered multiple facial fractures. Taking the plaintiff version as true, the court found that the injuries were not inconsistent with the plaintiff's statement. Although there were issues of credibility, particularly in light of plaintiff's .26 alcohol level, the credibility issue must be left to the jury.

**Stewart v. Prince George's County, Maryland, 75 Fed.Appx. 198 (4th Cir. 2003)**

Plaintiff kept on going back into a Target store being disruptive and threatening two employees. The first time Officer Vitko responded he warned him to leave and told him that he would be arrested if he returned. The second time he brought plaintiff to a security room and explained that he was issuing him a citation. Stewart became agitated and a melee ensued during which Vitko frantically radioed for assistance. He pepper sprayed the plaintiff and struck him with his asp baton. About five minutes into the struggle, another officer arrived and thereafter, three more, who together subdued the plaintiff and cuffed him behind his back. The plaintiff went into cardiac arrest and died en route to the hospital. Three witnesses disputed the officers' and security staff's version of the events. They claimed that officers pummeled the plaintiff outside the store and he lay defenseless on the ground crying out for the police officers to stop.

Although the differing statements of witnesses, would normal preclude a summary judgment, in this case, there was videotaped footage that confirmed the officers' testimony and

destroyed enough of the plaintiffs' eyewitness versions to require that judgment be given to the officers. When plaintiffs' counsel was asked at the hearing why the videotape was inconsistent with his witnesses' statements, he responded "the tape is lying". Plaintiffs' counsel did not offer any evidence as to how the videotape was lying and the court found no reason to indulge in speculation. A nonmoving party may not rely on mere conclusory allegations, speculation or the doing of one inference upon another. In addition to the videotape evidence there was also the frantic radio call of the officer and plaintiff's blood found in the security office, which also contradicted plaintiffs' three witnessed.

**Gray-Hopkins v. Prince George's County, Maryland, 309 F.3d 224 (4th Cir. 2002)**

Officers were dispatched to a parking lot following a dance. They heard a person in the crowd state that an individual in a Cutlass had a gun. When officers approached the vehicle, front seat passenger ran disappearing into the crowd and the back seat passenger, the plaintiff, reached out of the car and grabbed at Officer White's gun. White backed up with the plaintiff coming out of the car and engaging in a struggle with him during which White was heard to say, "get off, let go, let me see your hands". While struggling for the gun, Officer Catlett fired a shot fatally striking Gary Hopkins.

Plaintiff claims that Hopkins was a peacemaker and when he was shot he was in a neutral position with his hands raised over his head. They supplied a witness substantiating this account.

Defendants argued there were no material issues of fact since a forensic examination showed that Hopkins had a laceration on his left index finger caused by the sharp edge of the site of the handgun and DNA recovered from White's handgun belonged to Hopkins.

The court found that the forensic evidence was not dispositive of the question of whether Hopkins resisted after exiting the vehicle, thereby denying the summary judgment motion based on a material issue of fact.

**Cunningham v. Gates, 312 F.3d 1148 (9th Cir. 2003)**

LAPD Special Investigation Section learned that Soly and Cunningham had been involved in armed robberies. Upon receiving tips of more criminal activity, they began a surveillance, which led to an observation of Cunningham and Soly robbing a liquor store. After the robbery, plain clothes and SIS officers in unmarked cars surrounded and "jammed" the suspect vehicle. Cunningham and Soly allege that the officers fired eighteen shot gun blasts and handgun shots at the car, killing Soly and leaving Cunningham paralyzed as well as wounding two fellow SIS officers. The defendants claim that Cunningham and Soly fired first.

A California jury convicted Cunningham of three counts of attempted murder as well as Soly's murder by provoking the officers into shooting at the get away car.

The defendants claimed that the plaintiff's actions should be dismissed under Heck v. Humphrey. In Heck, the U.S. Supreme Court ruled that "if a criminal conviction arising out of

the same facts stands and is fundamentally inconsistent with the unlawful behavior for which §1983 damages are sought, the §1983 action must be dismissed".

Cunningham accused the officers of using excessive force to deliberately create a situation that provoked him into firing. (Danger created theory). The court found that the jury in convicting Cunningham of felony murder found that Cunningham fired at the police during the commission of the robbery and that the conviction means that the jury must have concluded that at the moment Cunningham fired on the officers, he knew or should have known that they were police officers acting within the scope of their duties making it impossible for him to prove that they used excessive force when they jammed the get away car. The officers firing of their weapons could not constitute excessive force since there was no break between Cunningham's proactive act of firing at the police and their response.

Heck did not apply against Soly, since he was not convicted and there was no privity between him and Cunningham. In order to establish privity, the officers must show that Soly "'had an identity or community of interest with, an adequate representation by, the losing party in the first action' and that, 'under the circumstances, the Soly's 'should reasonably have expected to be bound by the prior adjudication'."

Cunningham's conviction did not on its face foreclose the possibility that the police also contributed to Soly's death.

**Vaughan v. Cox, 316 F.3d 1210 (11th Cir. 2003)**

In this case, the Appellate Court had earlier decided (264 F.3d 1027 (2001)) that a reasonable jury could find that the officer's use of deadly force was unconstitutional but that the officer was entitled to qualified immunity. The Supreme Court vacated the judgment and remanded the case in light of Hope v. Pelzer. The court again found the officer to be entitled to qualified immunity.

Officers in pursuit of a stolen pickup truck attempted to unsuccessfully box the vehicle in. The officers claimed that at one point one of the cruisers was struck by the suspect's vehicle and it is undisputed that during the pursuit, the suspects increased their speed and drove recklessly. The passenger in the vehicle was shot by one of the officers who pulled up along side of the vehicle. The court determined first, that because the officer intentionally shot at the individuals in the vehicle that there was a seizure under the Fourth Amendment. Because it was undisputed that the suspects had committed no crime involving the infliction or threatened infliction of physical harm, the issue was whether their continued pursuit posed serious harm to the officers or others and would reasonable officers have believed that deadly force was necessary to stop the suspects and that a warning was not feasible prior to the use of such force. The officers cited several cases where officers fired at dangerously operated motor vehicles including Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000). The court found that the dangerousness in this case was not so clear and it was also not clear that the officers could not have given warning. The court found that the rule announced in Garner did not apply with obvious clarity to Deputy Cox's conduct nor did prior decisions provide fair warning that his alleged conduct violated Vaughan's Fourth Amendment rights, therefore, entitling him to

qualified immunity. The dissenting opinion in both Appellate Court decisions cites cases from Connecticut, Minnesota and Tennessee for the proposition that officers should be on notice that the use of lethal force to restrain a suspect is unreasonable, however, all of these cases dealt with fleeing suspects on foot.

**Federman v. County of Kern, 61 Fed.Appx. 438 (9th Cir.2003)**

A SWAT team was called out to participate in an attempt to take Federman into custody for an involuntary psychiatric evaluation. After four hours, they lured him to the window and sprayed him in the face with pepper gas. Five officers knocked his door down, but when Federman fired two shots, the SWAT team retreated. The officers then fired three rounds of tear gas, threw a flash bang and reentered the home. Federman dropped his gun, drew a knife, and began walking toward the officers. One fired four rounds of wooden less lethal munitions and three others opened fire with standard ammunition, shooting Federman eighteen times, fatally wounding him. The plaintiff's claim that the aggressive entry to detain Federman for a psychiatric examination for odd, relatively, non-criminal behavior, provoked him to resist and turned a relatively minor situation into a fatal shooting. Applying the facts most favorable for the plaintiffs, one would have to find that the officers used excessive force as they alleged Federman was not a suspect and was attempting to surrender his knife when shot. Further, he had not threatened the SWAT team until he was sprayed with pepper gas, and did not attempt to flee his home or threaten anyone, nor was there any immediate need to subdue him. Therefore, the SWAT team entry into Federman's home and the officers shooting at Federman, were unreasonable.

**O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29 (2d Cir. 2003)**

Responding to a domestic violence complaint at a trailer park, officers decided that O'Bert would be arrested. When they urged him to come out of the trailer, O'Bert refused and when the officers threatened to enter O'Bert yelled, "I will blow your fucking heads off." Officers were told that he had only a rifle or hunting guns.

Two officers entered while one of the officers outside looked through the window. The officer outside did not see O'Bert with a weapon in his hands at any time. The two officers who entered also did not see a weapon in his hands, but one claimed he was out of sight for 10-15 seconds and Vargo, the shooter, said he was out of sight for a minute and feared that he would grab a gun. The shooting officer claimed that upon seeing O'Bert, his right hand was hidden and he suddenly turned with his right hand cocked at a 45 degree angle as though about to shoot.

The Court affirmed the denial of summary judgment based on the plaintiff's version of the facts, as well as the officer who was observing through the trailer window who stated O'Bert was unarmed and the actions of the non-shooting officer who holstered his weapon and tried to grab O'Bert, an act which belies the shooting officer's claim that he believed O'Bert could be armed. The Court also noted discrepancy between the shooting officer's statements made just hours after the shooting and those at a deposition a year and a half later. Immediately after the shooting, he said that O'Bert did not swing around until the other officer attempted to grab him

but later stated that he swung around first. The significance being it would be normal for a person to swing his arms when someone is trying to grab him.

**Stephenson v. Dingler, 332 F.3d 68 (2nd Cir. 2003)**

Police chasing the plaintiff, who was wanted on an indictment for murder, shot him in the back partially paralyzing him. The shooting officer said that he saw a shiny silver object. A knife was found near the body and picked up by another officer to secure it as a crowd was gathering. Plaintiff argued that the knife was planted and his expert said police violated procedures by not properly safeguarding the knife, testing it for fingerprints or photographing the crime scene. The jury simultaneously decided the issues of excessive force and qualified immunity finding that the officer used excessive force but was entitled to qualified immunity. The Court ordered a new trial indicating that the proper procedure would be for the jury to decide the issue of excessive force after which the Judge should provide specific interrogatories relative to a qualified immunity analysis such as whether the officer gave appropriate warnings, whether Stephenson was armed with a weapon and whether the officer actually believed that Stephenson was armed. This would enable the Court to determine whether the officer was ultimately entitled to qualified immunity.

**Scott v. Edinburg, No. 02-4085, __ F.3d __, 2003 U.S. App. Lexis 20697 (7th Cir. 2003)**

Defendant, an off-duty officer, shot and killed an individual who was attempting to steal his red convertible Ford Mustang. Given the officer's inconsistent statements, when he fired the first shot, the vehicle may have been backing toward him, just stopped, or it just started moving forward. At the time that he fired the second shot, the vehicle was driving at a high rate of speed out of the gas station parking lot, which had twelve or fourteen people in the vicinity. The other six shots were fired as Edinburg followed on foot. It is undisputed that one of the first few shots killed Scott. The court concluded that the officer's conduct was reasonable under the Fourth Amendment.

The first shot fired would be reasonable if the vehicle was moving toward Edinburg. The second theory of protecting bystanders would make the other shots reasonable. At the time he fired the shots he knew that Scott had committed a forcible felony and attempted to run him down in order to escape or at least acted recklessly with respect to that possibility. It was undisputed that when Scott was escaping at a high rate of speed through the parking lot, there were 12-14 bystanders, however, plaintiff provided identically worded affidavits from two witnesses, who stated that no one was actually in the direct path of the vehicle and that no bystander was forced to flee. These affidavits did not create an issue of fact since the issue was not whether anybody was in the path of the vehicle, but whether they were in the immediate vicinity, and in immediate danger of death or serious bodily injury. Plaintiff also submitted a report of their expert, which failed to create a genuine issue of material fact because even if the report was admissible, (it was not supported by a verifying affidavit as to its authenticity) they opined that the officer should have used lesser alternatives available. This position was rejected since the Fourth Amendment does not require the use of the least or the less deadly alternative so long as the deadly use of force is reasonable under Garner and Graham. Finally, Scott argued that the testimony of the one of the officer's instructors preclude summary judgment because he

testified that shooting into a moving vehicle and the use of deadly force against a non-dangerous fleeing felon is a violation of police procedures. The court noted that Section 1983 protects plaintiffs from constitutional violations, not violations of State law, or, in this case, departmental regulations and police practices.

**McCoy v. City of Monticello, 342 F.3d 842 (8th Cir. 2003)**

Officers observed McCoy's truck fishtailing on a slippery road, as it exited a bar at around midnight. After a one-mile pursuit, the truck landed in a ditch. When Officer Ouellette approached the vehicle with his gun drawn, he slipped, and his gun accidentally discharged, striking McCoy. An unintentional shooting during the course of a seizure does not amount to a Fourth Amendment violation. An officer drawing his weapon with the intent to cause the subject to submit is a threat of force intentionally applied satisfying the Fourth Amendment use of force standard. Therefore, the relevant inquiry was not whether Ouellette's act of firing his gun was objectively reasonable, but whether under the totality of the circumstances, the act of drawing his gun was objectively reasonable.

The officers had reason to believe that McCoy was driving while intoxicated and was attempting to avoid arrest, for that reason or some other illegal purpose. Under the circumstances, the court found that a jury could not find Ouellette's act of drawing his gun was objectively unreasonable, entitling him to qualified immunity.

**Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003)**

Officers responded to a call of an emotionally disturbed person at a 7-11 parking lot. They found Drummond, who was unarmed, hallucinating and in an agitated state. Before the ambulance arrived, the officers decided to take Drummond down for his own safety. Eyewitnesses indicated that an officer knocked him to the ground where he was cuffed and then two officers placed their knees on his back and neck. Drummond weighed only 160 lbs. and one of the officers weighed 225 lbs. During approximately another twenty minutes, Drummond repeatedly told the officers that he could not breathe, and they were choking him and that he needed water. One minute after he was placed in hobble restraints, he went limp at which point the officers removed the cuffs, hobble restraints and turned him over on his back. The officers performed CPR until paramedics arrived. Drummond was revived apparently seven minutes after losing consciousness, but suffered brain damage and is now in a permanent vegetative state.

The court recognized that some degree of physical restraints may have been necessary, however, the degree of force used was not justifiable. The court held that a person's mental illness must be reflected in any assessment of the government's use of force. Citing prior precedent, they held that tactics employed against an unarmed, emotionally distraught individual are ordinarily different than those involved in subduing an armed and dangerous criminal. "The officers - - indeed, any reasonable person - - should have known that squeezing the breath from a compliant, prone and handcuffed individual, despite his pleas for air, involves a degree of force that is greater than reasonable."

Officers would have known that such force was unreasonable based on the publicity about a Southern California asphyxiation case that resulted in a $650,000.00 settlement months before this incident. Also, the police department had issued a training bulletin in April of 1998, specifically warning officers that, "when one or more officers are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, and may be a precipitating factor in causing death." In addition, there were prior federal cases describing the dangers of pressure on a prone, bound, and agitated detainee.

## Failure to Protect

**Bukowski, et al. v. City of Akron, 326 F.3d 702 (6th Cir. 2003)**

Plaintiff was a nineteen-year-old mentally disabled girl who graduated from a special education program and was proficient in using the computer. On the internet she met a thirty nine year old man who told her he was a disabled eighteen year old and encouraged her to go from her home in Pennsylvania, to his, in Akron, Ohio. She traveled to Akron on her own, where she was repeatedly raped by Hall. Three days later the local authorities in Pennsylvania were able to track Hall by an email and contacted the Akron Police who convinced the plaintiff to come to the police station at about midnight. She appeared to be able to take care of herself, and spoke favorably of Hall referring to him as her boyfriend and repeatedly asking to be returned to his residence. After checking with a victim's advocate and prosecutor/legal advisor, officers returned the plaintiff to Hall at approximately 4:30 a.m. The plaintiffs claim that the officers did an affirmative act by returning plaintiff to a dangerous situation. The court found that in this case, like DeShaney, the government merely returned the victim to a situation with a preexisting danger. However, even if it were found that they put her in a more dangerous position, they did not act with the requisite culpability, which in this case, would be deliberate indifference. At the time they returned her, they had a nineteen year old who was able to travel hundreds of miles on her own to meet a man on the internet who she seemed to like. They did not know that he was dangerous and had earlier raped her. The court also addressed the difficult situation that the officers were in. By returning the plaintiff they faced this lawsuit, however, if they had detained her, they would have faced a lawsuit on charges of false imprisonment. In summary, they did not breach their constitutional obligation to refrain from actively increasing an individual's susceptibility to private violence. Officials have no constitutional obligation to prevent such violence and in fact, in this case, they did not possess the legal authority under state law to intervene by detaining the plaintiff.

**Schieber v. City of Philadelphia, 320 F.3d 409 (3rd Cir. 2003)**

Shannon Schieber was raped and murdered on the night police responded to a 911 call from one of her neighbors saying they heard a woman screaming. Officers promptly responded and investigated the matter for six minutes prior to leaving without entering the woman's apartment. During their investigation they interviewed the neighbor who called as well as the neighbors above and below who heard nothing. They also checked for signs of forced entry and knocked and announced at Schieber's door but heard no response. The court concluded that while one could argue that with the benefit of hindsight the officers may have exercised poor judgment and may have been guilty of negligence, they were not deliberately indifferent to

Schieber's constitutional rights. The plaintiff further claimed that the officers prevented the neighbors from taking independent action by telling them to do nothing but to call 911 if they heard further noise. The court having concluded that there was an insufficient basis to warrant peace officers in making a forced entry, that even if their advice to the neighbors prevented a private forced entry, such advice would not constitute action, which could be said to be "shocking to the conscience". The court also mentioned the important competing interests of the possibility that Schieber's constitutionally protected interests and personal security was in jeopardy, versus the certain infringement on her constitutionally protected interests in privacy if forcible entry were made.

**Windle v. City of Marion, 321 F.3d 658 (7th Cir. 2003)**

Officers intercepted cellular telephone calls evidencing an ongoing sexual relationship between two lesbian lovers. After being informed of these conversations, Sergeant Raymer, intercepted several conversations over a two month period and became concerned when he learned that one of the participants was an older female who was a middle school teacher and the other, a young female, who was a student. Raymer took no intervening action for about two months until a phone conversation led the sergeant to believe that the young girl was in danger of doing something drastic and was possibly suicidal. Plaintiff claimed that Raymer's inaction violated her due process rights. The court found that the defendant did not act affirmatively by failing to protect her as they did not create or make things worse. The plaintiffs also could not rely on a state statute because state law violations do not form the basis for imposing Section 1983 liability. Finally, the theory of liability that would apply when one police officer fails to stop another when committing an unconstitutional act did not apply as the court concluded that the rule was not so broad as to place the responsibility on every government employee to intervene in the acts of all other governmental employees.

**Brown v. Commonwealth, 318 F.3d 473 (3rd Cir. 2003)**

As Shacquiel Douglas was choking on a grape, 911 was called 3 times before EMT's arrived 10 minutes after the initial call. The one year old died two days later due to asphyxia due to choking. Following decisions of the 7th and 11th Circuits, the 3rd Circuit found that due process does not require the State to provide rescue services and therefore there is no obligation on the State to provide competent rescue services, if it chooses to provide them.

Plaintiff's failure to train claim also failed as even if the municipality had adopted a policy of inadequately training its officers, there is no direct causal link between the policy and the constitutional violation.

**Christiansen v. City of Tulsa, 332 F.3d 1270 (10th Cir. 2003)**

At approximately 9:00 a.m. Christiansen's wife phoned police reporting that her husband had a loaded .38 caliber pistol and an A.K. 47 and had threatened to kill her and commit suicide. At about 5:15 p.m. Christiansen shot himself. Just prior to his committing suicide the police fired a flexible baton into a window of the apartment. The court found that this did not amount to excessive force, as there was no evidence of physical injury.

Plaintiffs claim that the defendants violated plaintiff's fifth and fourteenth amendment rights under the Special Relationship Doctrine. They claimed that the department's quarantine

limited his freedom to act and his freedom to renew his request for medical assistance. Absent involuntary restraint there is no duty to protect under the Special Relationship Doctrine. An affirmative duty to protect arises not from the state's knowledge of an individual's predicament, but from the limitation which is imposed on his freedom to act on his own behalf. Here, the deceased had access to a telephone line for most of the standoff, and turned down repeated offers for medical treatment.

The court explained that to make a proper danger created claim requires a six-part test: (1) the actor's created or increased plaintiff's vulnerability; (2) plaintiff was a member of a specifically definable group (3) defendant's conduct put plaintiff at substantial risk of serious immediate and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of the risk, and (5) such conduct when reviewed in total, is conscience shocking. Citing, Gonzalez v. City of Castle Rock, 307 F.3d 1258 (10th Cir. 2002).

The key to their claim was that the officers prevented Christiansen's mother and doctor from having contact with him. The court held that the police were entitled, if not obliged, to prevent a third party from endangering her life by attempting to aide in the course of a police rescue. Also, in this case, the decision to prevent the mother from entering was intended to forestall the suicide, as Christiansen indicated that he wanted to speak to his mother to explain why he was committing suicide. Finally, although they had instructed his doctor not to contact him, and eventually disconnected the phone line, nothing in the record indicated that the doctor actually insisted on speaking with Christiansen, and a negotiator twice asked if he wanted to speak to his doctor.

**Cavalieri v. Shepard, 321 F.3d 617 (7th Cir. 2003)**

After kidnapping his former girlfriend and threatening to kill himself and her, plaintiff was taken into custody and brought to the city jail. After meeting with the defendant for about an hour, he was transferred to a county jail where he attempted to commit suicide by hanging himself with a phone cord, leaving himself in a comatose state. Under both the Eighth and the Fourteenth Amendment the plaintiff has the burden of showing that "(1) harm to the plaintiff was objectively serious; and (2) that the official was deliberately indifferent to her health or safety."..."a detainee establishes a Section 1983 claim by demonstrating that the defendants were aware of a substantial risk of serious injury to the detainee, but nevertheless failed to take appropriate steps to protect him from a known danger." The court concluded that if the trier of fact believes plaintiff's mother's account they would believe that he was on the verge of committing suicide, clearly a serious harm. The alleged facts were that Shepard told Mrs. Cavaliere that her son was upset during his interview, and that Mrs. Cavaliere told Shepard that her son should be on suicide watch, that he knew he had been on suicide watch only a month before, and that the girlfriend had told Shepard that Steven had warned her that he would kill himself if he was ever returned to jail. The court found that a jury could believe that Shepard was deliberately indifferent by not communicating to the county staff that plaintiff had suicidal inclinations. The court also found that Shepard was not entitled to qualified immunity as the right to be free from deliberate indifference to suicide was clearly established, and Shepard was on fair notice that failure to inform other government authorities of the potential suicide would amount to deliberate indifference. Shepard had argued that earlier case law did not extend to this

situation as plaintiff was transferred from the custody of his police department to a county facility. The court noted that "while there are different arms of state government the walls between them are not as high as Shepard implies. To the contrary, each must keep the other informed about material facts, including suicidal risks." Citing, Farmer v. Brennan.

**May v. Franklin County Board of Commissioners, 59 Fed.Appx. 786 (6th Cir. 2003)**

Kirk called 911 three times and could be heard screaming and crying with a male voice yelling in the background. The second and third calls were terminated by some action in the apartment. Before the last call, Kirk yelled, "leave me alone… get out of here" and "you're not ripping my phone out… get out of here." The dispatcher did not relate this information but merely told the responding officers there was a "good domestic". The officers knocked on the door, looked through the windows and attempted to get the phone number to no avail. They left not knowing that Kirk was being restrained by her boyfriend, who sometime later beat her to death.

Plaintiff claimed that the officer, by knocking and then leaving, emboldened the boyfriend because it diminished his fear of arrest. They also claimed that the 911 emergency response system displaced other means by which a victim of domestic violence might protect themselves had they not relied on the officer's response. The court rejected the 911 argument, but found the plaintiff could proceed to a jury on the embolden claim on the basis that the affirmative act made Kirk more vulnerable to danger. Analyzing the officer's affirmative actions the court found insufficient culpability to be liable under the substantive due process theory. Knocking on the door, looking through the windows and then leaving did not amount to acts which shocked the conscious, absent proof that the officer knew what Kirk had said to the 911 operator, or the way in which the calls were terminated.

## Supervisory Liability

**Greene v. Barber, 310 F.3d 889 (6th Cir. 2002)**

When Greene, a six-foot, 300-pound lawyer, went to the police department to retrieve his vehicle after it had been towed, he asked an intern, and later, Lieutenant Barber, why he was paying a storage fee before he had received notice that his car was in storage. Greene claims that Barber was very arrogant and informed him that "that is the way we do it", to which he replied to Barber "you know, you're really being an asshole." After a brief exchange about the First Amendment, Greene said "well, if that's how you feel, you're really stupid." This exchange took place in the police lobby where there were 20 or 30 people who noticed the incident, and some interns who allegedly had to place their callers on hold, since Greene, while not screaming, was speaking in a raised voice.

On being informed that he was under arrest and ordered to place his hands on the counter, Greene refused and started yelling that Barber had no right to arrest him. Two officers, who had not been present during the exchange, assisted Lt. Barber in arresting the resisting Greene who was pepper-sprayed during the process. The Chief appeared after the pepper spraying but before the handcuffing and informed Greene "just cooperate and we'll get through this". All were sued.

Neither the Chief nor the officers could be held liable since none of them witnessed the exchange leading to the arrest. The court held that Mr. Greene's characterization of Lt. Barber as an asshole was not egregious enough to trigger application of the "fighting words" doctrine and although Lt. Barber may have had probable cause to believe Greene was violating the city ordinance prohibiting persons from causing a disturbance or quarreling in a public place, the existence of probable cause under the ordinance would not justify the arrest if the officer's true motivation was to punish a slight to his dignity. "In Houston v. Hill, 482 U.S. 451 (1986), the Supreme Court recognized that the "fighting words" doctrine may be limited in the case of communications addressed to properly train police officers because police officers are expected to exercise greater restraint in their response than the average citizen. The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers …. The freedom of individuals verbally to oppose or challenge police action without risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state" at 462-463.

**Arndt v. City of Boulder, Colorado, 309 F.3d 1247 (10th Cir. 2003)**

Plaintiff was a detective with the Boulder Police Department, one of the first officers to arrive at the scene of the Jon Benet Ramsey murder, the only one present when the child's body was found and was involved in the investigation for five months. She and others were repeatedly criticized in the media and sought to have the Chief respond to these criticisms or to allow her to respond herself. The Chief refused and imposed a gag order forbidding anyone in the police department from speaking to the media. Plaintiff claimed that this amounted to a violation of her First Amendment right to speak out on a matter of public concern. The court affirmed the granting of summary judgment finding that this was not a matter of public concern. Her proposed speech addressed purely personal concerns, which were specifically intended to clear her person reputation and restore her personal good name. The fact that the murder investigation garnered tremendous media attention and that she wished to respond publicly to the media criticism, did not transform her speech into a matter of public concern.

**Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003)**

After responding to plaintiff's home with thirty police vehicles including a SWAT team, the Chief reported to newspapers that plaintiff was a retired member of the Green Berets trained as a sniper, had threatened to kill himself and was armed with several large caliber weapons, and it was his belief that plaintiff was suicidal. At the time of the incident, plaintiff was at an Army base (not home), not heavily armed, and according to hospital records, not suicidal.

Inaccuracies by themselves do not make a statement defamatory. For example, plaintiff was a Green Beret, but had not received sniper training. Also, the opinion of the Chief that the plaintiff was suicidal could not support a claim for defamation or infliction of emotional distress, since it was an expression of opinion based on disclosed or assumed non-defamatory facts.

The court concluded that the Chief's statements regarding Yohe's arrest might have contained inaccuracies, which were perpetuated in the newspapers. Those statements and articles constituted legitimate non-defamatory flow of information from a government official to

an interested public. The plaintiff could not make an end-run around the First Amendment by suing for emotional distress.

**Brass v. County of Los Angeles, 328 F.3d 1192 (9th Cir. 2003)**

Plaintiff, Brass, was arrested on a warrant seeking James Nichols for vehicular burglary. The address shown on the warrant was Brass's, and coincidentally he fit the physical description of Nichols, and both had missing left hand finger joints. Brass was released after 39 hours following a determination that he was not Nichols. For some unknown reason, plaintiff failed to claim that his rights were violated by the failure to arraign him properly after his arrest or to release him promptly after determining that he was not Nichols until this second appeal. Because he failed to make these claims, at the earlier stages of litigation, the court found that he had waived them.

Brass claimed that the policy or custom of the county in processing releases of prisoners pursuant to court order, only after it has completed the processing of all other inmates, resulted in a violation of his constitutional rights. Unfortunately, the court did not agree that this (policy) or custom violated his constitutional rights merely because it raised an issue of priority in processing prisoners for release.

**Kuha v. City of Minnetonka, 328 F.3d 427 (8th Cir. 2003)**

At 5:30 a.m., an officer pulled over the plaintiff for failing to dim his lights. The plaintiff ran from the vehicle into a marshy field. Thirty minutes later, a canine found the plaintiff hiding in grass, which was three feet tall. The dog continued to bite the plaintiff until the handler called him off, after the plaintiff complied with the officer's orders to release the dog's head. The court first concluded that no federal appeals court has held that a properly trained police dog is an instrument of deadly force. The court then determined that a jury could properly find it objectively unreasonable to use a police dog trained to bite and hold without first giving warning and opportunity to surrender. (Several cases and the IACP policy were cited).

The court determined that the decision to use the canine for the apprehension was objectively reasonable as a matter of law. The court then found that it was not objectively unreasonable for the officers to require the plaintiff to release the dog prior to calling the dog off. The officers were confronted with an inexplicable flight from a minor traffic stop in the early morning hours. The suspect chose to swim through a swamp and the area the officers were searching was difficult to traverse. In light of the short time frame (10-15 seconds) at issue, and the conditions under which the plaintiff fled and was found, the court concluded as a matter of law that the officers actions after plaintiff was bitten were not objectively unreasonable. The court finally concluded that the officers were entitled to qualified immunity, as the law was not clearly established under the Fourth Amendment, that failure to give a verbal warning prior to using a police dog was unconstitutional.

The City's policy on warning did not address these circumstances. The directive stated "the canine handler gives a verbal warning before entering a building and on each successive floor to search." If the jury finds that the failure to give a verbal warning before using a police dog trained to bite and hold, is objectively unreasonable, the jury could also conclude that the

City's policy on police dogs, which authorized them only to bite and hold and which did not mandate a verbal warning in this scenario, caused the constitutional violation.

**Grazier v. The City of Philadelphia, 328 F.3d 120 (3d Cir. 2003)**

Two relatively new officers working plain clothes stopped Campbell for a motor vehicle violation by blocking him in at an intersection and emerging from their vehicle with their guns drawn. Campbell, believing his was being carjacked, threw his car in reverse striking another car and then drove forward toward Hood who fired four shots striking Campbell three times. A jury found the officers not liable and the District Court granted a judgment as a matter of law for the City. Plaintiff appealed claiming the City inadequately trained its officers.

Plaintiff's claim failed for two reasons. First, in order to find municipal liability plaintiff would have to first show a constitutional harm. The jury's verdict of no liability against the officers indicated they found no constitutional harm. City of Los Angeles v. Heller, 475 U.S. 796 (1986). Second, even if the plaintiff had shown some underlying constitutional harm, he would have had to prove "the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights, that the policymakers failure to respond amounts to deliberate indifference". In this case, the City had and enforced directives on use of force and proper vehicle investigation techniques. When the City finds a violation, it retrains the officers and metes out disciplinary measures. In this case, the officers received thirty days suspension. The plaintiff complained that the City provided insufficient field training and failed to instruct officers in shoot/no shoot procedures, however, the evidence showed the City did provide extensive on-the-job training even if it was not in the precise form that the plaintiff's would prefer.

**Olsen v. Layton Mills Malls, 312 F.3d 1304 (10th Cir. 2003)**

Plaintiff was mistakenly arrested for using a fraudulent credit card. During the course of the arrest at the mall, in transport and at the station house, he repeatedly told officers that he suffered from OCD, needed his medication and experienced panic attacks. He claimed that the municipality should be held liable for failing to train their officers on how to deal with persons with OCD. The Court noted that more than 2% of the population is afflicted with OCD and awareness of this affliction seeped into the mainstream and the film "As Good as it Gets" and the television show "Monk". A jury might determine that OCD is a sufficiently serious medical need to warrant attention. Therefore, a jury could find that by ignoring plaintiff's statements of medical need and panic attacks the officer was deliberately indifferent to a serious medical need. Plaintiff failed to allege facts showing that Layton City manifested deliberate indifference for the rights of OCD sufferers but did allege that Davis County manifested deliberate indifference by failing to train its jails pre=booking officers to recognize OCD and handle sufferers appropriately. The pre-booking officers took away plaintiff's medication even after he informed them that he required it. This raised a genuine issue of material fact as to whether the County had notice of and was deliberately indifferent in its failure to train pre-booking officers on OCD.

**Herzog v. Village of Winnetka, Illinois, 309 F.3d 1041 (7th Cir. 2002)**

Plaintiff, a middle-aged schoolteacher, had two sips of wine during dinner. When driving home, she noticed something wrong with her dashboard lights and pulled over. A probationary officer pulled in behind her, ordered her out of the car, and allegedly pushed her down. A DUI test was conducted, which plaintiff claims she passed, nevertheless, the officer handcuffed her and arrested her for driving under the influence. She then forced a plastic device into her mouth cracking a tooth, and told her to blow. The test revealed a blood alcohol level of .00. Plaintiff was transported to headquarters where she complained that the handcuffs were too tight. A second officer merely laughed and they were not loosened for an hour. A Breathalyzer test resulted in another .00 finding, yet plaintiff was taken to the hospital for a urine test, which was taken in the presence of an officer, although the hospital had installed special toilets for privacy testing. Plaintiff was told that if she refused the test her license would be suspended. She was charged with speeding and driving under the influence of drugs. The blood and urine tests proved negative and both charges were dismissed.

The court denied summary judgment finding (1) the arrest was made without probable cause; (2) the shove and refusal to loosen tight handcuffs amounted to excessive force; (3) gratuitously forcing plaintiff to urinate in the presence of another was an invasion of privacy; (4) the offense of physical touching following the illegal arrest allowed for damages aside from the independent constitutional violations; (5) although the cracking of plaintiff's tooth by inserting the breathing device may have been accidental, she would be entitled to damages under a battery claim; (6) the consent that the blood and urine tests was invalid since it was made under a threat that if she refused her license would be suspended for a longer time than if she consented. The court concluded that if the plaintiff's facts are believed, the arresting officer was totally incompetent. (Note: if the plaintiff's facts were even close to true, now would be the time for administrative corrective action).

**Hernandez v. Borough of Palisades Park P.D., 2003 WL 202441, 58 Fed. Appx. 909, 2003 U.S. App. Lexis 1638 (3rd Cir. 2003)**

The department policy encouraged citizens to advise homeowners when they would be away. Officer Anderson, with his lieutenant's approval, used this opportunity to rob the Hernandez' home. The robbery was part of an ongoing string of robberies committed by five Borough police officers. The district court first recognized that police departments cannot be sued along with a municipality, and that there was insufficient evidence that the burglaries were part of a policy or custom. The plaintiff argued that because the lieutenant probably served as the commanding officer, he was a policy maker, however, there was no evidence to suggest that he was the commanding officer at the time of the robberies.

The court also found insufficient evidence that the chief was aware of similar unlawful conduct but failed to take corrective action. The mere existence of past robberies, an earlier complaint by an alarm company to the lieutenant that the police may have committed the burglary, which may not have been communicated to the chief, and rumors that Anderson had been committing burglaries without evidence that the chief knew of these rumors, were insufficient to prove constructive knowledge. The failure to train claim also failed in that it was not plainly obvious that police officers sworn to uphold the law would burglarize the homes of citizens because they lacked training that instructed them that such activity was unlawful.

**Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003)**

Supervisory liability claims were brought against Attorney General Janet Reno, Assistant Attorney General Eric Holder and INS Commissioner, Doris Meissner, regarding the raid at the Gonzalez' home to take custody of Elian Gonzalez. Plaintiffs allege that the defendants personally directed and caused the paramilitary raid and had actual knowledge of and agreed to and approved of the raid in violation of their Fourth Amendment Rights. The court dismissed the claims finding that the vague and conclusory allegations did not establish supervisory liability. Plaintiffs failed to allege that the defendants directed the agents on the scene to spray the house with gas, break down the door with a battering ram, point guns at the occupants or damage property. The reasonable inference, which must be drawn from the factual allegations, is that the supervisory defendants ordered the execution of a valid search warrant with the expectation that the officers would act in a lawful manner. In apparent conflict with Leatherman, the court stated: "we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving a defense of qualified immunity." See Also, Dalrymple v. Reno, 334 F.3d 991 (11th Cir. 2003)

**Lytle v. Doyle, 326 F.3d 463 (4th Cir. 2003)**

A captain asked a lieutenant to investigate options for handling a group of pro-life demonstrators who were demonstrating on a highway overpass. The lieutenant found that officers could issue summonses pursuant to the loitering code. Another lieutenant, never reading the code, responded to the incident, approached the protestors and provided them with copies of the code as he had been instructed to do so by the captain. They were told that they would be arrested if they did not cease their activities, and after two were arrested the others left. After the incident the Chief disseminated a memo stating that the Attorney General was reviewing the Constitutionality of the code, and officers are not to rely on the statute in handling protest situations. The Attorney General discovered that the no loitering signs had been posted without approval of the Commissioner of Transportation. The court found that the code was unconstitutionally vague, as it did not give notice as to what specific conduct would constitute a violation. The court found that the municipality could not be held liable, as the enforcement of the code was not an official policy. The Davis memo could not constitute an official written policy because it was never approved by the City Manager or the Chief of Police. In short, the document was merely an unauthorized memorandum written by a police captain that was followed by a Norfolk police officer on a single occasion - - not an official city policy. The failure to train claim also failed as the Norfolk Police Department was shown to have extensive, varied and ongoing training and plaintiffs failed to show that additional training would have resulted in police officers responding differently.

**Cherrington v. Skeeter, 344 F.3d 631 (6th Cir. 2003)**

Plaintiff was arrested during an undercover drug operation on Saturday at approximately 2:30 a.m. The police refused to allow her to contact someone to take care of her two-year-old daughter fearing that the operation might be jeopardized. Instead they were taken to a motel, where they remained for the next twenty-four hours. She and her daughter were then taken to the

police department where the plaintiff was processed and a friend came to pick up the daughter. Because of the holiday weekend, plaintiff was not arraigned until over forty-eight hours later. The court analyzed the seizure of the two-year-old under the Fourth and Fourteenth Amendment. Clearly there was no probable cause to seize the child, however, probable cause is not the only basis for taking custody of a child. Given the time of the arrest, it was not clear that there were available and preferable alternatives, and there was no evidence that the child suffered any harm. While it may have been a better course of action to make arrangements with a friend or relative, the law is "silent on the lawfulness in keeping a young child with her mother while the latter is placed under arrest and held in custody at a location other than a traditional detention facility."

Relying on the Supreme Court's decision in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."… "judicial determinations of probable cause within forty-eight hours of arrest, will, as a general matter, comply with the promptness requirement of Gerstein." The delay of over forty-eight hours requires the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance that led to the delay. The time from Cherrington's arrest until being brought before a magistrate was seventy-two hours. The undercover operation concluded more than forty-eight hours before her presentation and the excuse that the arrest was made over Labor Day holiday did not constitute extraordinary circumstances. The record was not sufficient for the court to determine whether they City could be held liable for a failure to train or for having an unconstitutional policy, which led to the delay in plaintiff's arraignment. Clearly it was foreseeable that defendant city's police officers, would occasionally make warrantless arrests that require instruction on the need to ensure that individuals arrested without a warrant are brought before a magistrate within forty-eight hours for a probable cause determination. However, they may have known of their responsibilities but not been able to carry out this obligation due to the unavailability of a magistrate over the long holiday weekend. If this were true, the city could be held liable for failing to provide the necessary resources to ensure that individuals arrested without warrant, are arraigned in a timely fashion. The case was remanded to the district court with an invitation to the parties to close this evidentiary gap.

**Burge v. St. Tammany Parish, 336 F.3d 363 (5th Cir. 2003)**

The mother of a murder victim reported to police that she could not identify the person who her son left with on the night of his murder. At trial, she contradicted this statement saying she saw her son leave with Gerald Burge. Her first statement was not admitted at trial, as the detective kept it in the trunk of his car, with other original documents because he was afraid that if it was disclosed, they would lose the case. The jury returned a verdict in favor of Burge and against the detective and the sheriff. The department had a policy that all records were to be turned over to the prosecutor's office. Burge claimed that the policy of records mismanagement caused this constitutional violation. The court found that plaintiff did not establish deliberate indifference on the part of the sheriff, that a Brady violation would be a highly likely consequence of the manner in which the office manages their records or transferred them to the district attorney. The court also found that although the manager of the records division did not have formal training, she had received on the job training and Burge failed to produce any evidence tending to show that such on the job training was inadequate or that any specific

individual training should have been received by employees of the records room. Because Burge failed to establish the existence of a single prior Brady violation, they reversed the judgment against the sheriff.

**Sanchez v. City of Albuquerque, 65 Fed.Appx. 241 (10th Cir. 2003)**

Plaintiff contended he was arrested on two occasions when officers of the Albuquerque Police Department allowed another person to falsely identify himself as plaintiff after several traffic stops. In affirming the dismissal of the complaint, the court noted that the city could not be held liable under a theory of respondeat superior, plaintiff failed to allege that a constitutional violation occurred due to a municipal policy or custom, and he failed to name the individual officers.

**Savard v. State of Rhode Island, 320 F.3d 34 (1st Cir. 2003)**

Plaintiff and similarly situated individuals, brought an action claiming that Rhode Island maintained written policies that new arrestees admitted to correctional facilities undergo strip searches and visual body cavity searches, was unconstitutional. The court found such a policy to be unconstitutional citing decisions from all circuits except the third and the tenth, that the law is clearly established that people arrested for non-violent, non-drug related minor offenses, could not be subjected to strip and visual body cavity searches, absent reasonable suspicion that they were concealing contraband or weapons, even when those arrestees were co-mingled with general prison populations.

## Miscellaneous

**Ziegler v. Eby, No. 03-1126, 2003 U.S. App. Lexis 20607, 2003 WL 22293210 (3rd Cir. 2003)**

The family of Aaron Ziegler brought a lawsuit against police officers who arrested him for possession of marijuana, claiming that they conspired out of vindictive conspiracy intending to humiliate, demean and harass him and that his suicide was a reasonably foreseeable result of their intentional misconduct. The complaint alleged school officials and the police attempted to make an example and retaliated against Aaron because of his refusal to submit to a drug test. They claimed they arrested Aaron at the high school and placed him in handcuffs and leg shackles and then alerted the media and waited for local reporters to arrive at the magistrate's office before removing Aaron from a police cruiser and escorting him into the building. The plaintiffs had no evidence to refute the police claim that they did not delay his visit to the magistrate or contact the media. Even if these allegations were true there was a formal separation between these events as well as his graduation from high school and his suicide.

**James Pouillon v. Sharon Little, 326 F.3d 713 (6th Cir. 2003)**

An anti-abortion activist arrested by police refused two pretrial offers pursuant to Rule 68 of the Federal Rules of Civil Procedure. ($2,500.00 and $10,001.00 inclusive of costs and attorney's fees). The first jury trial ended in a verdict for defendants but was reversed and the second trial resulted in a jury verdict in favor of the plaintiff in the amount of $2.00. The

attorney's fees requested were $35,690.00. The Court denied the motion for attorney's fees finding that pursuant to Farrar v. Hobby, the award of nominal damages was not sufficient to justify an award of attorney's fees pursuant to §1988. Second, the Rule 68 offer that is not accepted within ten days never looses its cost shifting effect in the life of the case.

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